

Appeal from a decision of the Utah State Office, Bureau of Land Management, rejecting a simultaneous oil and gas lease offer in part. U-53665.

Dismissed in part; set aside and remanded in part; affirmed in part.

1. Administrative Practice -- Rules of Practice: Generally -- Rules of Practice: Appeals: Effect of

While it is true that after a notice of appeal of a BLM decision has been filed with the Board, BLM lacks authority to modify the decision under appeal, BLM is not precluded from undertaking analyses as to the correctness of its original decision. Where the record on appeal includes a re-evaluation by the Bureau completed subsequent to the filing of an appeal concluding that areas previously designated as within a known geologic structure are not so located, such a determination cannot be ignored.

2. Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: Known Geologic Structure -- Oil and Gas Leases: Noncompetitive Leases

Lands within a known geologic structure of a producing oil or gas field may be leased only after competitive bidding under the provisions of 30 U.S.C. § 226(b) (1982). Where lands are determined to be within such a structure after a simultaneous oil and gas lease drawing but prior to issuance of a lease, a noncompetitive lease application for such lands must be rejected.

3. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Known Geologic Structure -- Oil and Gas Leases: Noncompetitive Leases

An applicant for a noncompetitive oil and gas lease who challenges a determination that certain lands are within the known geologic structure of a producing oil or gas field has the burden of showing by a preponderance of the evidence that the determination is in error.

4. Estoppel

Estoppel will not lie against the United States where there is no evidence of affirmative misrepresentation or concealment of material fact by the Government.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant; R. Timothy McCrum, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

B. K. Killion appeals from a March 16, 1984, decision of the Bureau of Land Management (BLM) rejecting his simultaneous oil and gas lease offer to the extent certain lands contained therein were found by BLM to be within a known geologic structure (KGS). Killion was the first-drawn applicant for parcel UT-313 in the July 1983 simultaneous oil and gas lease drawing. The KGS, known as the Greater Bitter Creek-Red Wash undefined KGS (Bitter Creek KGS), was established effective December 6, 1983. The Bitter Creek KGS includes the following described lands in appellant's lease offer, consisting of 7,321.73 acres:

T. 6 S., R. 5 W., Uintah Special Meridian, Utah

Sec. 1, lots 2-4, S 1/2 N 1/2, S 1/2; Secs. 3, and 9, all; Sec. 10, N 1/2, N 1/2 S 1/2, SE 1/4 SE 1/4; Sec. 11, all; Sec. 12, W 1/2 NE 1/4, SE 1/4 NE 1/4, W 1/2, SE 1/4; Sec. 27, W 1/2 NE 1/4, SE 1/4 NE 1/4, NW 1/4, N 1/2 SW 1/4, SE 1/4 SW 1/4, SE 1/4; Secs. 29, and 32, all; Sec. 33, N 1/2, N 1/2 SW 1/4, SE 1/4 SW 1/4, SE 1/4; Sec. 34, N 1/2, N 1/2 SW 1/4, SE 1/4 SW 1/4, SE 1/4; Sec. 35, all.

The 1,924.89 acres in the lease offer not affected by the KGS are:

T. 6 S., R. 5 W., Uintah Special Meridian, Utah

Sec. 18, lot 4
Sec. 19, all
Sec. 30, all
Sec. 31, all.

The N 1/2 NW 1/4 sec. 27, T. 6 S., R. 5 W., Uintah Special Meridian, Utah, which is a part of the Bitter Creek KGS, was initially determined to be a KGS on April 24, 1981, as part of the Chokecherry KGS. Appellant does not challenge the April 24, 1981, KGS determination, and states that BLM's decision as to the aforementioned land is "apparently correct" (Reply at 6). Therefore, we dismiss this appeal of BLM's decision as to the N 1/2 NW 1/4 sec. 27, T. 6 S., R. 5 W., Uintah Special Meridian, Utah.

The record reflects numerous changes in BLM's assessment of the KGS status for lands in the lease offer and contiguous lands in the area. On April 24, 1981, the Geological Survey (GS) defined the Chokecherry KGS by adding new land to the preexisting KGS's. At that time the Chokecherry KGS totaled 24,731.81 acres. As to land within the subject township, the Chokecherry KGS covered the following:

T. 6 S., R. 5 W., Uintah Special Meridian, Utah

Sec. 1 S 1/2
 Sec. 2 S 1/2
 Sec. 3 S 1/2
 Sec. 4 S 1/2
 Sec. 8 SE 1/4
 Secs. 9 to 17 inclusive
 Secs. 20 to 28 inclusive
 Sec. 29 NE 1/4
 Sec. 36 N 1/2, SE 1/4

On July 24, 1981, GS stated: "By letter of May 11, 1981, effective April 24, 1981, the Chokecherry KGS was established in Duchesne County, Utah, incorporating four previously undefined KGS's. A reevaluation of the data which the determination was based on shows that an error was made and the KGS was invalidly made too large." Thus, the Chokecherry KGS of April 24, 1981, was pared from 24,731.81 acres to 2,160 acres. Of the lands in the lease offer, only the N 1/2 NW 1/4 sec. 27, T. 6 S., R. 5 W., Uintah Special Meridian, remained KGS. This was the status of the lease offer land at the time of the July 1983 simultaneous oil and gas lease drawing.

After the drawing, the Bitter Creek KGS was established, affecting 769,887.93 acres. This KGS added 302,040.93 acres to existing KGS lands. The lands in the lease offer which were affected by this KGS have previously been identified.

On February 9, 1984, BLM partially revoked the Bitter Creek KGS determination, releasing approximately 80,000 acres from KGS status. BLM stated: "Based on reevaluation of available data, the following lands were included in the Greater Bitter Creek-Red Wash KGS in error, and are hereby revoked." The revocation affected lands just east of the lands in the lease offer, but did not affect lands within the lease offer.

On August 3, 1984, while this case was on appeal, the Deputy State Director, Minerals Resources, issued a memorandum notifying the Deputy State Director, Operations, that the Bitter Creek KGS determination as to secs. 29, 32, 33, 34, and 35, T. 6 S., R. 5 W., Uintah Special Meridian, Utah, was being revoked. He stated:

All available geologic data pertaining to the southwestern part of the Greater Bitter Creek-Red Wash KGS have been reviewed and it has been determined that the lands described below are not presumptively productive. The following lands are therefore revoked, effective December 6, 1983: Uintah Special Meridian, Utah, T. 6 S., R. 5 W., Sections 29, 32, 33, 34 and 35.

Simultaneous application U 53665, B. K. Killion, is affected by this action.

On appeal, the Office of the Solicitor, representing BLM, advises that the August 3, 1984, memorandum by the Deputy State Director, Minerals Resources, is of no effect. The Solicitor states:

While this appeal was pending, on August 3, 1984, BLM purported to revoke a 5 section portion of the Greater Bitter Creek Red Wash [KGS] lying wholly within the lease offer involved in this appeal. (See Exhibit 11). Under established IBLA precedent, the filing of an appeal to this Board terminates BLM's authority to reconsider one of its decisions. John J. Sexton (On Reconsideration), 20 IBLA 187 (1975). "Any matters relating to the appeal pending before the State office devolved to the jurisdiction of this Board at the time the appeal was made." 20 IBLA at 192. BLM now agrees that the August 3, 1984, memorandum was, and is, a nullity, and therefore seeks affirmation of the original decision of March 16, 1983, [sic] rejecting the lease offer as to the lands within the Greater Bitter Creek-Red Wash KGS. Of course, this Board's affirmation of the original BLM decision would not preclude BLM from re-examining the status of these 5 sections in the future.

Answer at 6, n.5.

[1] While it is true that after a notice of appeal of a BLM decision has been filed, BLM may not act to modify that decision, we do not regard the August 3, 1984, memorandum of the Deputy State Director, Mineral Resources, as such an action. Rather, it is the result of "analyses as to the correctness of [BLM's] original decision" of March 16, 1984, that was based on the Deputy State Director's previous memorandum of December 9, 1983, determining the extent of the KGS. See Benton C. Cavin, 83 IBLA 107, 114 (1984). Because "[i]t is the Board's duty to make sure that it has as complete a record as possible in deciding appeals to it," any party may develop and provide the Board with data relevant to a decision on appeal. In Re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983). Although the August 3 memorandum is a "nullity" so far as modifying the March 16 BLM decision is concerned, it does indicate that, upon BLM's reevaluation, there is no longer any support for that decision as to the five sections named. We therefore cannot ignore the August 3 memorandum and will set aside the March 16 BLM decision as to those five sections and remand the matter to BLM to issue a lease for them, all else being regular. 1/

[2] Section 17(b) of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226(b) (1982), provides that "[i]f the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive

1/ The lands to be leased are secs. 29, 32, and 35 in their entirety and the N 1/2, N 1/2 SW 1/4, SE 1/4 SW 1/4, SE 1/4 of secs. 33 and 34.

bidding * * *." See 43 CFR 3100.3-1; 43 CFR Subpart 3120 (concerning competitive leases). The regulation governing simultaneous noncompetitive oil and gas lease applications provides:

If, prior to the time a lease is issued, all or part of the lands in the offer are determined to be within a known geological structure of a producing oil or gas field, the offer shall be rejected in whole or in part as may be appropriate and the lease, if issued, shall include only those lands not within the known geological structure of a producing oil or gas field.

43 CFR 3112.5-2(b). It is well settled that a noncompetitive lease application for lands designated within a KGS must be rejected where lands embraced in that application are designated as within a KGS prior to issuance of the lease. Leonard Luning, 87 IBLA 123 (1985); John P. Brogan, 85 IBLA 379 (1985); Evelyn D. Ruckstuhl, 85 IBLA 69 (1985). This Department has no authority to issue a noncompetitive lease for lands within a KGS. McDonald v. Clark, 771 F.2d 460 (10th Cir. 1985); McDade v. Morton, 353 F. Supp. 1006 (D. D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974).

In his statement of reasons appellant attacks the inconsistent KGS determinations. He states, "One would seriously question why the Department found the enlargement of May 11, 1981 [Chokecherry KGS] as invalidly made too large, but in 1983 without any apparent additional well control or production in the area now finds that the same lands and other lands should be included in an enlarged KGS" (Statement of Reasons at 15).

E. W. Guynn, Chief, Branch of Fluid Minerals for BLM's Utah State Office, has this explanation for the inconsistent KGS determinations of the land in and surrounding the lease offer:

The original small KGS determinations were not made with any geologic data, and were made by people who felt that KGS's should include only the area which can be drained by a given well. This is the area of proven production, not the area that is presumptively productive. There was no attempt to correlate the wells to determine what could be expected between them. The Chokecherry KGS of April 1981 was an attempt to rectify the original, inadequate work. However, as the area was isolated with no production at that time, pressure from lessees caused the supervisor to withdraw the determination. On that basis, not on a geologic determination of error, the small KGS's were allowed to remain separate. This, however, did not change the geologic nature of the area.

(Answer at 14-15; Exh. 12).

With regard to the February 1984 KGS modification, Guynn stated:

The revision of the December 1983 KGS which removed areas which were not geologically supportable, left only those areas which were indeed known to be geologically supportabl[e]. The attempt to justify a larger area based on sand isopachs alone was an error

in judgment and was corrected. The area which remains is cohesive and based on geologically sound analysis.

Id.

BLM's explanation of its revisions is not unreasonable and, as found below, its KGS determination has not been shown to be erroneous.

[3] Appellant challenges the geologic basis for the Bitter Creek KGS as it affects the lease offer lands. The Secretary of the Interior has traditionally delegated the duty of determining the existence and boundaries of a KGS to experts in the field. When that expert makes a determination, the Secretary is entitled to rely upon his reasoned opinion. Edward W. Eidt, 89 IBLA 270 (1985); Leonard Luning, *supra*; Bruce Anderson, 63 IBLA 111 (1982).

This Board has often stated that an applicant for an oil and gas lease who challenges a determination that certain lands are situated within the KGS of a producing oil and gas field has the burden of showing the determination is in error. Evelyn D. Ruckstuhl, *supra*; Reed International, 80 IBLA 145 (1984); R. C. Altrogge, 78 IBLA 24 (1983). The burden on appellant is to show by a preponderance of the evidence that the determination is erroneous. Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); *see also* Woods Petroleum Co., 86 IBLA 46 (1985).

Appellant argues, however, that "[t]here is not a single well in Township 6 South, Ranges 4 and 5 West, U.S.M., which has sufficient production history to determine if in fact the well is capable of producing oil and gas in commercial quantities" (Statement of Reasons at 9). The BLM states that appellant erroneously places great weight on the fact that there is actual commercial production currently taking place in Township 6 South, Range 5 West, U.S.M. since "the statutory term 'producing oil or gas field' must be construed to include areas capable of producing oil or gas" (Answer at 9).

A KGS is the "trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive" 43 CFR 3100.0-5(1) (emphasis added). 2/ Thus, there must be a discovery of oil or gas, and the

2/ Appellant claims that BLM has enlarged upon the definition of KGS by the device of IM 84-35, dated Oct. 14, 1983, entitled "Procedures for Delineating the Area to be Included within Known Geological Structures of Oil and Gas Fields," and that this was done without compliance with the notice and comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982).

We agree with BLM that the Instruction Memorandum (IM) does not contain a new definition of KGS but is intended to ensure that KGS determinations are made "according to procedures having a sound geologic basis, consistent with the established administrative interpretations of the KGS standard" (Answer at 12). The IM merely clarifies and explains the existing KGS regulation. BLM has not applied a new definition of KGS to this case. That BLM was not establishing a new definition of KGS in IM 84-35 was clarified in Change 1 to this memorandum issued Nov. 14, 1983.

discovery must be "determined" to be productive, however, there is no requirement that the land in the KGS be actually producing oil and gas in commercial quantities. John P. Brogan, supra, R. K. O'Connell, 85 IBLA 29 (1985); Lloyd Chemical Sales, Inc., 82 IBLA 182 (1984). Land may be included within a KGS on the basis of drill stem tests, not just completed producing wells. R. K. O'Connell, supra; Lloyd Chemical Sales, Inc., supra.

The KGS boundaries are defined for administrative purposes. James Muslow, Sr., 51 IBLA 19 (1980). The determination does no more than announce that, on the basis of geological evidence, BLM has concluded that there is a reasonable probability that the land within the boundaries is underlain by a reservoir of a producing oil and gas field. Angelina Holly Corp., 70 IBLA 294 (1983), aff'd, Angelina Holly Corp. v. Clark, 587 F. Supp. 1152 (D.D.C. 1984); Robert L. Lyon, 66 IBLA 141 (1982). There is no prediction as to future productivity or statement as an existing fact that anything is known about the productivity of all land in that KGS. James Muslow, Sr., supra; Robert L. Lyon, supra. Land may properly be included in a KGS based upon geologic evidence indicating that a producing deposit extends under the land such that the land is considered to be "presumptively productive." Charles J. Frank, 90 IBLA 33 (1985); Thomas Bohr, Jr., 89 IBLA 384 (1985).

BLM's initial analysis justifying the KGS relied on sand isopach maps. 3/ Appellant challenged the validity of BLM's conclusion based on these maps (Statement of Reasons at 16). BLM in its answer stated that attempting to justify the Bitter Creek KGS based solely on isopach maps would be erroneous, but that the Bitter Creek KGS was based upon "detailed well data and commercially significant oil and gas discoveries in the area," as well as on the isopach maps (Answer at 11).

According to BLM the structure within the Bitter Creek KGS consists of multiple overlapping sands. Production is variable across the structure as there is no single producing sand (Exh. 12; Answer at 3). BLM has submitted two geologic reports, isopach maps, and cross sections of electric logs to support its KGS determination. According to BLM "each of these 5 sand units extends under all of the lands in the lease offer, with the exception of the Green sand" (Answer at 3). A geologic report detailing the nature of the area (Exh. 1) stresses that the subject lands in the township are part of a producing structure made up of the Douglas Creek Member of the Green River Formation. 4/ The report states in pertinent part:

Correlation of stratigraphic horizons which have produced oil in the parcel area show that there are at least 5 such overlapping producible sand horizons. These can be seen in the accompanying cross sections. The color coding is arbitrary.

3/ An "isopach" is defined as a "line, on a map, drawn through points of equal thickness of a designated unit." A Dictionary of Mining, Mineral, and Related Terms 593 (Bureau of Mines, Department of the Interior 1968). An "isopach map" is a map "indicating, usually by means of contour lines, the varying thickness of a designated stratigraphic unit." Id.

4/ Exhibit 1 is a Geologic Report of Greater Bitter Creek - Red Wash KGS, Western Edge prepared by Allen A. Aigen, 6-84.

Also accompanying are isopach maps of each of the 5 producible sand horizons showing the gross sand thickness and whether they were perforated and produced oil or gas. The separate structure map was drawn on the correlation line shown on the cross sections.

Four of the correlated beds (blue, black, red and purple) have been perforated and produce oil in the rapidly expanding Antelope Creek area (T. 5 S., R. 4 W.). These also produced in the parcel area. The correlations show the "purple" beds produced oil in Section 22, T. 5 S., R. 4 W., as well as in Section 24, T. 6 S., R. 5 W., and Section 5, T. 7 S., R. 4 W. The accompanying table of wells whose logs were correlated, and the isopach maps of each of the producing sands demonstrates the multiple, overlapping nature of the producing beds, and the connection between the rapidly expanding part of the KGS and the old KGSs. Three wells produced from the "blue" sands, two each from the green and black, seven from the red, and four from the purple.

* * * * *

The parcel has not been proven to be as productive as some other parts of the trend, but clearly contains oil and gas in some of the same multiple overlapping horizons. There is some element of risk as the area has not yet been completely tested, but the risk is small. * * *.

(Exh. 1 at 1-2). In addition, BLM cites the well production history in and near the lands in the lease offer as revealing the presence of "commercially significant quantities" of oil and gas. It highlights several wells shown on exhibits 4, 6, 8, and 9 which are considered by BLM and the Minerals Management Service to be capable of production along with others that are potentially productive (Answer at 3-6).

Appellant argues that the Department's sand correlations are "neither valid or geologically supportable" (Reply at 15). According to appellant, "there is no showing that the lands in his lease offer are within the same trap containing a well capable of producing oil or gas in paying quantities, nor are there demonstrated overlapping producing reservoirs" (Statement of Reasons at 26).

Appellant also challenges BLM's submission of cross sections of electric logs, which are intended to demonstrate five multiple and overlapping sand bodies which extend under the lands in the lease offer except the Green Sand (Reply at 14, 15). He states:

The Bureau of Land Management did not orient the electric logs based upon the dolomitic [sic] markers which can be correlated in the wells in the area, but forced correlations of what it calls sand bodies which are not apparent or valid. Appellant's Exhibit "P" are, electric log cross sections, with supporting text, of wells in the area, which are oriented based upon correlatable markers, and which reflect that the producing zones

do not extend under all of the lands in the lease offer. [Footnote omitted.]

Reply at 15.

Appellant has submitted a geologic report (Exh. K) and accompanying map which disagrees with the BLM determination, and concludes that the area within T. 6 S., R. 5 W., Uintah Special Meridian, is "not presumably productive." 5/

Appellant's geologist concludes that the "Green River Formation sands in T. 6 S., R. 5 W, have been disappointing as far as commercial hydrocarbon production is concerned, and future Green River production in the township is highly speculative" (Exh. K at 3).

From our review of the record, we conclude that the BLM geologic data and supporting information substantiate the KGS determination. Appellant's submissions do not demonstrate by a preponderance of the evidence that BLM's KGS action was in error. At best, appellant has established that geological experts may disagree regarding the exact location of a KGS boundary. Where such differences of opinion exist and the appellant has not shown that his interpretation of the data is more likely to be correct than that of the BLM, the Board will sustain the BLM finding. Sherbourne Partnership, 90 IBLA 130 (1985); Edward W. Eidt, supra. 6/

[4] Appellant asserts that the Secretary should be estopped from denying the issuance of a lease to appellant because the subject lands were offered to the public under the simultaneous filing system after BLM reviewed the lands and determined they were not located within a KGS. He contends the lease should issue because it was not his fault BLM delayed the lease issuance until after the KGS determination of December 9, 1983 (Statement of Reasons at 22-26).

BLM does not obligate itself to issue a lease by soliciting applications in the simultaneous system, by sending lease forms to an offeror for signature, or upon receipt of signed offer forms. It is only upon execution by BLM that the lease becomes effective. Sherbourne Partnership, supra; Thomas Bohr, Jr., 89 IBLA 384 (1985). In these cases we reiterated the Board's statement in Evelyn D. Ruckstuhl, 85 IBLA 69 at 72-3 (1985), "A drawing does not vest in a lease applicant a right, contractual or otherwise, to an oil and gas lease, but merely establishes the priority of filing. R. K. O'Connell, 85 IBLA 29 (1985); Joseph A. Talladira, [83 IBLA 256 (1984)]; McDade v. Morton, supra at 1010." See also Schraier v. Hickel, 419 F.2d 633, 666 (D.C. Cir. 1969). Furthermore, as this Board noted in

5/ A Geologic Report on the Bureau of Land Management Extension of the Greater Bitter Creek -- Red Wash KGS, Involving T. 6 S., R. 5 W., Uintah Special Meridian, by Steve Church (Exh. K at 1).

6/ Appellant's request for oral argument (Statement of Reasons at 27; Reply at 22) is denied. Pursuant to 43 CFR 4.25, oral argument is discretionary with the Board. Here the thorough briefs of the parties persuade the Board that this case can properly be disposed of from the record as constituted.

Frederick W. Lowey, 76 IBLA 195 (1983), absent a showing of affirmative misrepresentation or concealment of material fact by the Government, there can be no estoppel against the United States. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978). No such showing has been made in this case. Moreover, the authority of the United States to enforce a public interest such as that created by the Mineral Leasing Act cannot be lost by official delays in the performance of that duty. 43 CFR 1810.3; Bob F. Abernathy, 71 IBLA 149 (1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is dismissed in part, set aside and remanded in part, and affirmed in part.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Gail M. Frazier
Administrative Judge

